

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR & INDUSTRY

In the Matter of Wade Fitschen	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The above matter came on for a Prehearing Conference before Administrative Law Judge Richard C. Luis at 2:30 p.m. on February 16, 2006, at the Office of Administrative Hearings in Minneapolis. Michael J. Tostengard, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130 appeared on behalf of the Minnesota Department of Labor & Industry ("Department"). There was no appearance by or on behalf of the Respondent, Wade Fitschen. The hearing record closed on February 16, 2006.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Labor & Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Director of Legal Services, Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

Whether disciplinary action should be taken against Respondent Wade Fitschen for violation of Minn. Stat. §§ 326.84, subds. 1 and 1a, and 326.91, subds. 1(2) and 1(8), and Minn. R. 2891.0040, subp. 1H for engaging in unlicensed residential building contractor activity, for accepting a down payment for a lot he did not own, for failing to apply proceeds from a customer to the job covered by the contract with the customer, and for failing to pay the customer back after failing to apply the proceeds to the job specified in the contract with the customer?

Based on all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On January 12, 2006, a Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges was mailed to the Respondent at his last known address – RR 1, Box 168, Lake City, MN 55041. The Department discovered subsequently that the post office box number was incorrect and, on January 18, 2006, mailed a Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges to the Respondent at RR 1, Box 1682, Lake City, MN 55041. The Notice scheduled a Prehearing Conference for February 16, 2006.

2. The Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges contains the following language, on page 3:

1. Respondent's failure to appear at the prehearing conference may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that its proposed disciplinary action may be upheld.

3. The Respondent did not appear at the February 16, 2006, Prehearing Conference. He did not contact the Department, the Office of the Attorney General or the Administrative Law Judge to request a continuance. No Notice of Appearance was filed by the Licensee.

4. The allegations set forth in the Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges are deemed proved and are incorporated into these Findings by reference.

5. Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor & Industry have jurisdiction herein pursuant to Minn. Stat. §§ 14.50, 326.91 and 326.92.

2. The Respondent was given timely and proper notice of the Prehearing Conference in this matter, and the Department has complied with all procedural requirements of law and rule.

3. Under Minn. R. 1400.6000, the Respondent is in default as a result of his failure to appear at the scheduled Prehearing Conference.

4. Under Minn. R. 1400.6000, when a party defaults, the allegations and issues set out in the Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges may be taken as true and deemed proved. The Administrative Law Judge therefore takes those allegations and issues as true, and they are deemed proved.

5. Based on the facts set out in the Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges, the Respondent has violated Minn. Stat. §§ 326.84, subds. 1 and 1a, 326.91, subds. 1(2) and 1(8) and Minn. R. 2891.0040, subp. 1H. As a result, he is subject to discipline by the Minnesota Department of Labor & Industry.

6. An Order by the Commissioner of Labor & Industry imposing disciplinary action against the Respondent is in the public interest within the meaning of Minn. Stat. §§ 45.027, subd. 7(1) and 326.91, subd. 1.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that appropriate disciplinary action be taken against Wade Fitschen.

Dated: March 15, 2006

Reported: Default

s/Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge